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No. 94-1387

In the Supreme Court of the United States

OCTOBER TERM, 1995

YAMAHA MOTOR CORPORATION, U.S.A., ET AL.,
PETITIONERS

v.

LUCIEN B. CALHOUN, ETC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, with the recognition of a general federal maritime cause of action for maritime death in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), admiralty courts may continue to apply state law to determine the remedies available in cases involving the deaths of non-seamen in territorial waters.

2. Whether, under 28 U.S.C. 1292(b), the courts of appeals can exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the district court.

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INTEREST OF THE UNITED STATES

The United States operates thousands of ocean-going vessels and aircraft in the course of its governmental and military activities. The United States also is responsible for assuring that safe conditions exist within many navigable areas accessible to private boats, such as the waters surrounding United States naval stations, and to that end prepares nautical charts, dredges channels, and operates locks, dams, lighthouses, and buoys. The United States has waived its sovereign immunity from civilian suits arising within admiralty jurisdiction and is subject to wrongful death actions in much the same manner as private parties. See Suits in Admiralty Act §§ 1-12, 46

U.S.C. App. 741-752; Public Vessels Act §§ 1-9, 46 U.S.C. App. 781-789. The United States has a strong interest in encouraging fair, uniform, and harmonious remedies for the redress of wrongful death on navigable waters. The Court requested the views of the United States in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), a case raising issues closely related to the first question on which certiorari was granted in this case.

STATEMENT

1. On July 6, 1989, while vacationing with her parents at a resort hotel in Puerto Rico, 12-year-old Natalie Calhoun, the daughter of respondents Lucien B. and Robin L. Calhoun, rented a Yamaha jet-ski watercraft known as a "Wavejammer." While riding the Wavejammer, Natalie ran into a vessel anchored in the waters off the hotel frontage and was killed. Pet. App. A3-A4.

Respondents, individually and as the administrators of their daughter's estate, brought suit in United States District Court for the Eastern District of Pennsylvania against petitioners Yamaha Motor Company, Ltd., and Yamaha Motor Corporation, U.S.A. (Yamaha), respectively the manufacturer and distributor of the Wavejammer. Respondents sought recovery under Pennsylvania's wrongful death statute (42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1995)) and its survival statute (*id.* § 8302 (1982 & Supp. 1995)), alleging theories of negligence, strict liability, and breach of implied warranties of merchantability and fitness for purpose. Respondents sought damages for lost future earnings, loss of society, loss of support and services, and funeral expenses, along with punitive damages. Respondents' complaint invoked federal jurisdiction both on the basis of

diversity of citizenship (28 U.S.C. 1332)[1] and admiralty (28 U.S.C. 1333). Pet. App. A4-A5.

Yamaha moved for partial summary judgment, arguing that the damages recoverable for Natalie's death, if any, are governed by the general federal maritime cause of action recognized in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), and that, where that cause of action applies, it ousts state remedies. Yamaha further argued that, under the federal maritime cause of action, only Natalie's funeral expenses could be compensable as an element of damages. Pet. App. A5 & n.3. Respondents replied with alternative arguments that state remedial statutes may be applied to Natalie's death, but that, even if they do not apply, the federal maritime cause of action permits the award of the damages that respondents had sought. *Id.* at A55-A56.

2. The district court granted partial summary judgment to Yamaha. Pet. App. A52. It agreed with Yamaha that the federal maritime cause of action applies to respondents' claims arising out of Natalie's death, *id.* at A56-A58, and that state remedies do not apply. *Id.* at A59-A65. The court reasoned that allowing state remedies to govern maritime deaths would be inconsistent with this Court's goal of having the causes of action applicable to such deaths be federally defined ones "of national architecture." *Id.* at A63-A64. The court held, however, that in defining the federal maritime remedy and the damages available thereunder, courts may consider how States generally have responded to the problem of wrongful death, in addition to how the Death on the High Seas Act (DOHSA), 46 U.S.C. App. 761 *et.*

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[1] Respondents are citizens of Pennsylvania. Yamaha Motor Corporation, U.S.A., is a California corporation, and Yamaha Motor Company, Ltd., is a Japanese corporation. Pet. App. A4 n.2.

seq., which applies to deaths that occur more than three miles offshore, and the Merchant Marine Act, 1920 (Jones Act), 46 U.S.C. App. 688, which applies to the deaths of seamen, have addressed that situation. Pet. App. A65-A66. The court held that loss of society and loss of support are recoverable under the federal maritime remedy, but that lost future earnings and punitive damages are not, and accordingly granted Yamaha's motion for summary judgment with respect to those damages. *Id.* at A67-A72.

On Yamaha's motion, the district court certified for an interlocutory appeal the portion of its order denying summary judgment to Yamaha on the loss of society claim, finding the question whether such damages are recoverable under federal law to be a close one and "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Pet. App. A73 (quoting 28 U.S.C. 1292(b)); Pet. App. A77. On respondents' motion, the court amended its certification to add to it the portions of its order dismissing respondents' claims for future earnings and punitive damages. *Id.* at A78-A79, A80-A83.

3. The court of appeals did not address the questions that the district court had certified. Instead, the court held that it was necessary first to consider the premise underlying the district court's dismissal of respondents' damages claims that, in cases arising out of the deaths of non-seamen in territorial waters, the federal maritime cause of action displaces applying state remedies. Pet. App. A4, A6-A7. That premise, the court held, was wrong. It held that whether state remedies are displaced by federal law turns on whether those remedies "significant[ly] conflict with federal policy." *Id.* at A9; see also *id.* at A11, A14.

The court of appeals held that neither a state wrongful death statute nor a state survival statute as applied to the death of a non-seaman in territorial waters poses such a conflict. The court noted that such fatalities are covered neither by DOHSA nor the Jones Act (Pet. App. A28), and that this Court's decisions had not shown "great hostility to the operation of state statutes in providing rules of decision in admiralty cases" (*id.* at A25). The court discounted the federal interest in uniform remedies for maritime death, because of "the weakness with which the principle of uniformity * * * has been actually applied" in the context of maritime deaths. *Id.* at A26.

Turning to the state causes of action at issue, the court held that remedies provided by state survival actions are not displaced, because the federal maritime cause of action as recognized in *Moragne* is for wrongful death, not survival. Pet. App. A28-A29.[2] The court found the issue of displacement of state wrongful death remedies "more difficult." *Id.* at A32, A34. However, the court held that state remedies are not displaced, because the federal maritime cause of action is not a "clearly articulated federal statutory scheme[]" (*id.* at A35), because relying on DOHSA's preemptive effect would effectively

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[2] The court of appeals did not address the possibility that the federal maritime cause of action includes some survival damage elements. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 34 (1990) (leaving that question open). The court found inconclusive the fact that DOHSA contains no survival provision, because DOHSA does not apply to deaths within territorial waters. Although the Jones Act contains a survival provision, the fact that survival damages under the Jones Act are limited to losses suffered during the decedent's lifetime did not restrict respondents from seeking damages based on Natalie's lost future earnings, because "the Jones Act applies only to seamen." Pet. App. A29-A31.

apply DOHSA "in an area (maritime deaths in state territorial waters) in which Congress explicitly intended DOHSA to have no such effect" (*id.* at A38), and because preclusion of state remedies was not needed to further *Moragne*'s goal of filling gaps in remedial coverage (*id.* at A37). The court also viewed Section 7 of DOHSA, 46 U.S.C. App. 767, as implicitly preserving concurrent state remedies for deaths in territorial waters. Pet. App. A37-A38. The court of appeals left for remand the issue whether respondents' state-law claims are governed by the laws of Pennsylvania (the forum state) or Puerto Rico (the site of the accident). *Id.* at A42.

SUMMARY OF ARGUMENT

I. This Court has long emphasized the importance of uniform maritime remedies and the consequent need for a single, federal remedial standard to apply where federal maritime law governs. In particular, in the area of maritime tortious personal injury not resulting in death, the Court has held that the interest in maritime uniformity precludes state remedies from applying. Until recently, however, the area of maritime wrongful death raised peculiar problems because general maritime law did not recognize a remedy for wrongful death. To fill the void caused by the absence of applicable federal law, admiralty courts adopted state-law cause of action and remedies. The decision in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), however, ended this regime by recognizing a general federal maritime cause of action for wrongful death.

After *Moragne*, there is no longer any justification for the historical anomaly of applying state-law remedies to maritime deaths. On the contrary, allowing state remedies to supplement the federal maritime remedy would

create "anomalies" and "incongruit[ies]" in remedial coverage similar to those that *Moragne* identified as a principal reason for recognizing a federal maritime cause of action. 398 U.S. at 395. Both the Death on the High Seas Act (DOHSA), which applies to deaths outside the three-mile territorial limit, and the Jones Act, which applies to deaths of seamen, displace state remedies where they apply. Application of state-law remedies where those statutes do not apply (*i.e.*, to the deaths of non-seamen in territorial waters) would accord a broader range of remedies to some survivors of such decedents for no justifiable reason. It would also be inconsistent with this Court's teaching that the federal maritime cause of action is to be developed with DOHSA and the Jones Act serving as primary guides.

Far from being applied with "weakness," the principle of remedial uniformity has served as the basis for this Court's attempts in recent years to harmonize the federal maritime remedy with remedies under DOHSA and the Jones Act. Nor does Section 7 of DOHSA demonstrate Congress's intent to preserve state remedies against a federal maritime cause of action. Finally, there is no basis for concluding that the federal maritime cause of action does not apply to "recreational boaters."

II. The court of appeals correctly held that it had jurisdiction under 28 U.S.C. 1292(b) to address the issue of the applicability of state remedies. The text of Section 1292(b) makes clear that a court of appeals has jurisdiction to review the *order* certified by the district court, not merely the question or questions of law that the district court has identified as controlling. That conclusion is supported by *United States* v. *Stanley*, 483 U.S. 669 (1987), by every federal court of appeals to have addressed the issue, and by the purpose of Section 1292(b)

to provide immediate appellate review of orders before they result in fruitless litigation and wasted expense.

ARGUMENT

I. THE GENERAL FEDERAL MARITIME CAUSE OF ACTION FOR WRONGFUL DEATH RECOGNIZED IN *MORAGNE* v. *STATES MARINE LINES, INC.*, SUPPLIES THE EXCLUSIVE REMEDY IN CASES INVOLVING THE DEATHS OF NON-SEAMEN IN TERRITORIAL WATERS

The question in this case is whether, in light of the recognition of a general federal maritime cause of action in *Moragne* v. *States Marine Line, Inc.*, 398 U.S. 375 (1970), admiralty courts may continue, as they did prior to *Moragne*, to apply state-law remedial statutes in cases involving the deaths of non-seamen in territorial waters. In the view of the United States, plaintiffs may not supplement the remedies provided by the federal cause of action recognized in *Moragne* by applying remedies available under a state wrongful death or survival statute. Applying such state statutes would be inconsistent with the general framework of admiralty law, which emphasizes uniform remedies for maritime injuries, and would frustrate *Moragne*'s goal of ending the process by which the law yielded "different results for breaches of duty in situations that cannot be differentiated in policy." *Id.* at 405.

A. The "tortuous development of the law of wrongful death in the maritime context," *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 212 (1986), begins with *The Harrisburg*, 119 U.S. 199 (1886), which held that, although general maritime law provides a cause of action for tortious personal injury not resulting in death, it does

not provide a cause of action for wrongful death. The Court reasoned that, because the common law at the time supplied no civil action for an injury which results in death on the land, no different rule should apply with respect to maritime deaths. *Id.* at 213; see *Tallentire*, 477 U.S. at 212; *Moragne*, 398 U.S. at 380.

The rule of *The Harrisburg* left remediless persons killed either within state territorial waters or on the high seas. "Unable to tolerate th[e] archaism" underlying *The Harrisburg*, some admiralty courts began to allow recovery for deaths within state territorial waters by adopting state statutes that permitted such recovery. *Tallentire*, 477 U.S. at 212. In addition, this Court held in *The Hamilton*, 207 U.S. 398 (1907), that admiralty courts could apply state wrongful death laws to deaths on the high seas. However, "probably because most state wrongful death statutes were not meant to have application to the high seas," the holding of *The Hamilton* "did little to fill the vacuum." *Moragne*, 398 U.S. at 393 & n.10; see also *Tallentire*, 477 U.S. at 212-214.

In 1920, Congress enacted two laws that together filled much of the void left by *The Harrisburg*. The first, DOHSA, provides a recovery for death "caused by wrongful act, neglect or default occurring on the high seas." 46 U.S.C. App. 761. DOHSA displaces state court remedies where it applies. *Tallentire*, 477 U.S. at 232. The second, the Jones Act, an omnibus statute to promote the welfare of American seamen, in its pertinent part accords seamen the same remedies for death as are provided in the Federal Employers' Liability Act, 45 U.S.C. 51-60, whether such death occurs in territorial waters or on the high seas. Like DOHSA, the Jones Act displaces state wrongful death remedies where it applies. See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 155 (1964) (Jones Act is "of general application intended

to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States") (quoting *Lindgren* v. *United States*, 281 U.S. 38, 44 (1930)); accord *Northern Coal & Dock Co.* v. *Strand*, 278 U.S. 142, 147 (1928); *Panama R.R.* v. *Johnson*, 264 U.S. 375, 392 (1924).

The federal courts, however, continued to struggle with that portion of *The Harrisburg*'s legacy that was undisturbed by Congress—the absence of a federal maritime cause of action for wrongful death of non-seamen occurring in the territorial waters. In 1921, this Court held that, in such cases, admiralty courts could adopt the cause of action for wrongful death provided by the State in whose waters a death occurred:

> [w]here death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given. The subject is maritime and local in charact r and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.

Western Fuel Co. v. *Garcia*, 257 U.S. 233, 242 (1921). However, over the next 50 years, the Court rendered a series of maritime decisions, which it ultimately found difficult to reconcile, attempting to apply state wrongful death statutes in admiralty cases. See *Goett* v. *Union*

Carbo Corp., 361 U.S. 340 (1960); *Hess* v. *United States*, 361 U.S. 314 (1960); *The Tungus* v. *Skovgaard*, 358 U.S. 588 (1959); *Just* v. *Chambers*, 312 U.S. 383 (1941). Much of the problem resulted from the holding in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), that the traditional admiralty duty of shipowners to provide seamen with a seaworthy ship extends to longshoremen, who are not seamen.[3] Because unseaworthiness is a "species of liability without fault," *id.* at 94, state wrongful death statutes that provided recovery only for negligent conduct were either held not to encompass claims of unseaworthiness or, if so held, were manifestly ill-suited to those claims. See G. Gilmore & C. Black, *The Law on Admiralty* § 6-31, at 365-367 (2d ed. 1975) (attempts to apply state wrongful death laws to claims of unseaworthiness were a "jurisprudential disaster").

In *Moragne*, the Court revisited *The Harrisburg*. Moragne, a longshoreman, had been killed while working on a ship within Florida territorial waters. His widow's claim for relief based on the ship's unseaworthiness had been dismissed, because neither federal statute or general maritime law provided a wrongful death action where the death had occurred in territorial waters, and because Florida wrongful death law required a showing of negligence and therefore did not apply to cases of death caused by non-negligent unseaworthiness. The Court overruled *The Harrisburg* and held that "an action does lie under general maritime law for death caused by violation of maritime duties," including the duty to

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[3] That holding was made obsolete by the 1972 amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(b), which precluded longshoremen from taking advantage of the doctrine of unseaworthiness. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 30 n.1 (1990).

provide a seaworthy ship. *Moragne*, 398 U.S. at 409. *The Harrisburg* had "rested on a most dubious foundation when announced," the Court observed, and with the later adoption of wrongful death statutes by all 50 States and by Congress in various enactments including DOHSA and the Jones Act, "it ha[d] become an increasingly unjustifiable anomaly." *Id.* at 404; see also *id.* at 379-393.

A federal maritime cause of action was also needed, the Court stated, to eliminate three unjustifiable "anomalies" or "incongruit[ies]" in existing law applicable to maritime death. *Moragne*, 398 U.S. at 395-396. First, victims of unseaworthiness within territorial waters could recover if they had been injured but not if they had been killed. *Id.* at 395.[4] Second, because unseaworthiness claims are cognizable under DOHSA, an identical breach of the duty to provide a seaworthy ship would produce liability for high-seas fatalities but not for fatalities within the territorial waters of a State whose tort remedies did not encompass claims of unseaworthiness. *Ibid.* Third, because the Jones Act precludes state remedies, a seaman would not receive a remedy for death in territorial waters caused by unseaworthiness, whereas a longshoreman would enjoy such a remedy if one were available under state law. *Id.* at 395-396. The Court envisioned that the newly recognized federal cause of action for wrongful maritime death would eliminate such "litigation-spawning confusion" and "supplant the present disarray in this area with a rule both simpler and

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[4] The Court's reference was to seamen, who enjoyed a federal cause of action for unseaworthiness where they were injured, see *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 99 (1944), but not where they were killed. See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 155 (1964); *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 428-430 (1958); G. Gilmore & C. Black, *supra*, § 6-32, at 368.

more just" than that of *The Harrisburg*. The new federal cause of action would also end the process by which the law yielded "different results for breaches of duty in situations that cannot be differentiated in policy," and assure the "uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.* at 401, 404-405.

B. The Court had no occasion in *Moragne* to consider whether, with the recognition of a federal cause of action, state wrongful death and survival statutes may continue to be used to determine the remedies available in cases involving the deaths of non-seamen in territorial waters. However, the courts of appeals to address that issue after *Moragne* (with the exception of the court of appeals below) have uniformly—and in our view, correctly—held that such remedies are not applicable.[5] The Court in *Moragne* sought to "give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" 398 U.S. at 402 (quoting *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874)). See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373, 374 (1959) (although "State and

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[5] See *Wahlstrom* v. *Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1089 (2d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994); *Nelson* v. *United States*, 639 F.2d 469, 473 (9th Cir. 1980); *In re S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976); see also *Preston* v. *Frantz*, 11 F.3d 357, 358 (2d Cir. 1993) (federal maritime remedy preempts state survival statute), cert. dismissed, 115 S. Ct. 31 (1994); *Evich* v. *Morris*, 819 F.2d 256, 257-258 (9th Cir.) (same), cert. denied, 484 U.S. 914 (1987); *Texaco Ref. & Mktg., Inc.* v. *Estate of Dau Van Tran*, 808 S.W.2d 61, 64 (Tex.) (federal remedy preempts state wrongful death and survival actions), cert. denied, 502 U.S. 908 (1991).

Federal Governments jointly exert regulatory powers" over maritime law, "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system"); *The Lottawanna*, 88 U.S. (21 Wall.) at 575 ("It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.").[6] Adoption of state law was necessary, prior to *Moragne*, in order to fill a remedial gap where wrongful conduct caused death rather than injury. After *Moragne*, however, there is no longer a need to use state law in this fashion, and the general principle of uniformity in admiralty should be enforced.

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[6] See also, *e.g.*, *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961) (holding that a maritime contract is not subject to a state statute of frauds); *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409 (1954) (holding that a state direct action statute may not be applied against a maritime insurer); *Union Fish Co.* v. *Erickson*, 248 U.S. 308 (1919) (holding that a maritime contract is not subject to a state statute of frauds); *The Roanoke*, 189 U.S. 185 (1903) (holding that a State may not create a maritime lien against an out-of-state ship for costs incurred in repair). The admiralty cases upon which the court of appeals in this case relied (Pet. App. A8-A9) involved state rules of decision that were procedural in nature and did not "work [any] 'material prejudice to [a] characteristic featur[e] of the general maritime law.'" *American Dredging Co.* v. *Miller*, 114 S. Ct. 981, 987 (1994) (upholding Louisiana law preventing *forum non conveniens* doctrine from applying in maritime law cases brought in state court); see also *id.* at 990 (Souter, J., concurring) (determination whether a state rule is "substantive" or "procedural" will generally determine whether it is preempted under federal maritime law).

Of particular relevance here, where tortious personal injuries other than death have been inflicted within maritime jurisdiction, the interest in maritime uniformity has long been held to preclude the application of state remedies. A maritime tort is "a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features'" *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953) (quoting *Panama R.R.*, 264 U.S. at 386. Accordingly, federal maritime law—rather than state law—determines the remedies for injury even when the tort has occurred within state territorial waters or when the plaintiff has invoked state court or diversity jurisdiction. See, *e.g.*, *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959); *Pope & Talbot*, 346 U.S. at 409-411. Likewise, before the enactment of the Jones Act, the Court rejected an injured seaman's argument that he was entitled to a state common law remedy of full indemnification rather than the applicable maritime remedy of maintenance and cure. See *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 382 (1918).[7] The Court has also held that a longshoreman injured while unloading a ship, having been engaged in maritime activity, must invoke federal remedies rather than resort to state worker's compensation laws. Otherwise, application of the laws of different States would produce varying remedies in ports across the country

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[7] See also, *e.g.*, *Messel* v. *Foundation Co.*, 274 U.S. 427, 434 (1927) (requiring application of federal maritime law in a personal injury action brought in state court); *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, 457 (1925) (same); *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 259 (1922) (same); *Workman* v. *New York City*, 179 U.S. 552, 557-558 (1900) (refusing to recognize a state law claim of municipal immunity in a negligence action brought in admiralty court).

and result in the "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish." *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216-217 (1917).[8]

The adoption by admiralty courts of state death statutes before *Moragne* was therefore an historical anomaly. Had the federal maritime remedy for death been recognized in the nineteenth century, there can be little doubt that it would have been treated as an exclusive remedy under the principles of maritime uniformity that guided *Chelentis*, *Jensen*, and *The Lottawanna*. State remedies were adopted by admiralty courts only because, as long as *The Harrisburg* survived, wrongful death was "untouched" by general maritime law, *Western Fuel Co.*, 257 U.S. at 240, leaving it to state statutes to fill the remedial vacuum.

With the demise of *The Harrisburg* and the recognition of a federal maritime cause of action, there is no

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[8] Congress attempted to override the result in *Jensen* by authorizing the application of state worker's compensation statutes to maritime injuries. But this Court invalidated that attempt as an unconstitutional delegation of federal maritime power, holding that Congress could not authorize the States to prescribe rules governing maritime injuries that "would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established." *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 164 (1920); see also *Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219, 227-228 (1924) (invalidating later legislation on same ground). The Court did recognize an exception to *Jensen*, applicable in cases where "the application of the local law [would not] materially affect" the uniformity of maritime law. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, 477 (1922). Ultimately, Congress passed the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, which prescribes exclusive federal standards for compensation to injured longshoreworkers and related maritime employees. See generally *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 306-324 (1983).

longer any reason to allow state remedies to apply to maritime fatalities. On the contrary, to allow state remedial schemes providing a more generous measure of damages than the federal remedy to supplement that remedy would create at least three unjustifiable "anomalies" and "incongruit[ies]" (*Moragne*, 398 U.S. at 395-396) similar to those that *Moragne* sought to eliminate. First, because federal remedies for non-fatal injuries within maritime jurisdiction preclude the application of state remedies, see pages 15-16, *supra*, identical breaches of maritime duties would be subject to different measures of damages, solely because the victim of one breach was killed whereas the victim of another was injured. Second, because DOHSA precludes state remedies for wrongful death on the high seas, beneficiaries of persons killed in territorial waters would have access to supplemental state remedies but beneficiaries of persons killed in identical accidents on the high seas would not. Third, because the Jones Act precludes state remedies for the wrongful death of seamen, beneficiaries of non-seamen would likewise in some cases be eligible for a broader range of remedies than beneficiaries of seamen. That result would seem inconsistent with the "special solicitude" that admiralty law has traditionally accorded seamen. See *Moragne*, 398 U.S. at 387.[9]

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[9] In *Moragne*, the Court also expressed dissatisfaction with the "difficult litigation" that had resulted from the need to apply state statutes to peculiarly maritime duties, such as that of seaworthiness. 398 U.S. at 408. The duty of seaworthiness presently extends only to seamen, as a result of legislation in 1972 that rendered that doctrine inapplicable to cases involving longshoremen. See note 3, *supra*. However, the Court's broader concern with the mismatch between state tort statutes and uniquely maritime duties and concepts continues to counsel against applying state remedies in this area. See *Moragne*, 398 U.S. at 401 n.15 ("Federal law, rather than state, is the more

Application of state-law remedies in this area would, finally, be inconsistent with the principle that the federal maritime remedy is to be developed with its statutory cousins, DOHSA and the Jones Act, serving as the "primary guide." See *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 624 & n.19 (1978); *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 27 (1990) ("[A]n admiralty court should look primarily to these legislative enactments for policy guidance," because Congress's enactments "both direct and delimit our actions"). *Mobil Oil* and *Miles* looked to DOHSA and the Jones Act for the purpose of answering questions relating to the damages recoverable under the federal maritime cause of action. The applicability of state remedies to that cause of action should similarly be patterned upon DOHSA and the Jones Act, both of which displace state remedies where they apply.[10]

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appropriate source of a remedy for violation of the federally imposed duties of maritime law").

[10] The Court declined to grant certiorari in this case on the question of the damages available under the federal maritime remedy, see 115 S. Ct. 1998 (1995), and that question is distinct from the question of applicability of state remedies. Several cases in the Court have involved the extent of those federal remedies. The Court initially held that, in addition to pecuniary losses (*e.g.*, loss of support), survivors of a person wrongfully killed may recover damages for loss of society. See *Sea-Land Servs., Inc.* v. *Gaudet*, 414 U.S. 573 (1974). More recently, the Court has held that such damages are not recoverable in cases to which DOHSA (*Mobil Oil*) or the Jones Act (*Miles*) would apply, so as to respect Congress's judgment that only pecuniary losses should be recoverable in cases governed by those statutes. *Miles* also stated that "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen," see 498 U.S. at 31, while noting that subsequent legislation relating to longshoremen has rendered *Gaudet* inapplicable on its facts, see *id.* at 30 n.1. The Court has left open the question whether the federal maritime cause of action has a "survival"

C. In holding that state remedial statutes may apply to the deaths of non-seamen in territorial waters, the court of appeals relied on three factors, apart from the fact (Pet. App. A28) that Congress has not expressly preempted such claims. First, the court discounted the federal interest in the uniformity of remedies for maritime death, on the ground that this Court has applied the principle of uniformity "weak[ly]." *Id.* at A26. The sole disuniformity that the court of appeals identified, however, is the fact that loss-of-society damages are available under the federal maritime cause of action, see *Sea-Land Servs., Inc.* v. *Gaudet*, 414 U.S. 573 (1974), but not under DOHSA or the Jones Act. Pet. App. at A21, A26. The continued vitality of *Gaudet*, however, is open to question, as the Court in *Miles* appears to have confined *Gaudet* to cases involving longshore workers, observing that its ruling would "restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." 498 U.S. at 33; see

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dimension allowing losses incurred by the decedent himself (*e.g.*, pain and suffering, future income, medical expenses) to be recovered. See *Miles*, 498 U.S. at 34; *id.* at 35 (noting that Jones Act contains a survival provision but that DOHSA does not). However, the Court has held, even if a federal maritime action seeking survival damages could proceed, the lost future earnings of a seaman would not be recoverable. See *id.* at 34. The Court reasoned that such damages are not recoverable under most state survival laws or under the Jones Act (which limits recovery to losses suffered during the decedent's lifetime), that lost-future-earnings damages often duplicate survivors' loss-of-support damages, and that recovery of lost future earnings is not "consistent with the general principles of maritime tort law." *Id.* at 35-36. See *Wahlstrom*, 4 F.3d at 1091-1094 (holding, based on analysis in *Miles*, that the estates of non-seamen are barred from recovering non-pecuniary damages and lost future earnings damages in a general federal maritime action).

also note 10, *supra*. It is true that the remedies prescribed by Congress in DOHSA and the Jones Act do not themselves mirror each other in all particulars (*e.g.*, the existence of a survival provision in the Jones Act but not in DOHSA). This Court, however, is free to shape the nonstatutory federal maritime remedy (including its preclusive effect over state law) to promote the interest in uniformity. In any event, any dissonance between the separate "national rule[s]" provided by DOHSA and the Jones Act, *Mobil Oil*, 436 U.S. at 624 n.18, cannot justify continuation of the much greater disuniformity produced by allowing fifty different state remedial schemes to govern maritime deaths.

The court of appeals also interpreted Section 7 of DOHSA, 46 U.S.C. App. 767, as signifying congressional intent to preserve state wrongful death remedies in territorial waters. Pet. App. A37-A38; *id.* at A34 n.34. That interpretation was incorrect. Section 7 provides:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

As the Court held in *Tallentire*, Section 7 serves merely "as a *jurisdictional* savings clause" (emphasis added): It ensures that state courts would not be deprived, by virtue of DOHSA, of the right to continue to entertain suits arising out of maritime deaths. 477 U.S. at 221. Section 7 does not suggest that state remedies applicable to deaths in territorial waters would continue to apply notwithstanding the creation of the general federal maritime remedy for wrongful death in *Moragne*. Indeed, the language of Section 7 seems inconsistent with a

claim that it was intended to bear on the effect of later common law developments in federal maritime law. See DOHSA § 7, 46 U.S.C. App. 767 ("The provisions of any State statute * * * shall not be affected *by this chapter*.") (emphasis added).

Finally, the court of appeals suggested that the federal maritime cause of action for wrongful death might not extend to the deaths of "recreational boater[s]" in territorial waters, or that if it did, that it might simply be defined in those waters by the relevant State's remedies. See Pet. App. A10 n.7, A32 n.32; see also *id.* at A30 n.29 (defining a "recreational boater" as any person not covered by the Jones Act as a seaman). The court of appeals emphasized, however, that its holding did not turn on that theory. See *id.* at A10 n.7, A33 n.33, A34 n.34, A37 (stating that, even if the federal maritime cause of action applies to such deaths, concurrent state causes of action are not displaced).

To the extent that the court of appeals thus sought to limit the reach of (or to redefine) the federal maritime remedy, it was in error. Admiralty jurisdiction applies to recreational boating accidents on navigable waters, such as the fatal collision in this case between a jet-ski watercraft and an anchored vessel, as the court of appeals acknowledged. Pet. App. A7 n.5. See *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 675-677 (1982) (accident between two recreational vessels on navigable territorial waters bears sufficient relationship to traditional maritime activity to fall within scope of federal admiralty jurisdiction); *Sisson* v. *Ruby*, 497 U.S. 358, 365-367 (1990) (multi-boat fire caused by defective appliance aboard pleasure boat docked at marina falls within scope of admiralty jurisdiction); see also *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1049-1053 (1995). There is no basis for concluding that

the federal maritime cause of action applies only to those territorial-waters fatalities within admiralty jurisdiction that involve a seaman, or that, in territorial waters, the federal remedy is merely a vehicle for adopting state law when a seaman is not involved. On the contrary, *Moragne* itself noted that the recognition of a federal remedy was an attempt to advance the goal of making federal admiralty law "a system of law coextensive with, and operating uniformly in, the whole country." 398 U.S. at 402 (quotations omitted); see also *Mobil Oil*, 436 U.S. at 624 n.18 (referring to standard governing fatalities in territorial waters as a "national rule"); *Miles*, 498 U.S. at 30 ("There is * * * little question that *Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen").[11]

An approach that would restrict the federal maritime cause of action to certain categories of decedents (those who were not "recreational boaters") would also frustrate important maritime policies. Under such an approach, the same commercial vessel would have its conduct measured under federal standards were it to collide tortiously with another commercial vessel, but under state law were it to collide in identical fashion with a pleasure boat. Exposure to divergent standards of liability or measures of damages would have a significant potential to disrupt maritime commerce. See *Foremost*, 457 U.S. at 674-675 ("The federal interest in protecting maritime commerce * * * can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct"); *Grubart*, 115 S. Ct. at

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[11] In cases involving recreational boating accidents on navigable waters, the lower federal courts have consistently applied the general federal maritime cause of action. See Pet. 11-12 & n.15 (citing cases).

1047. Moreover, because the use of state remedies in cases involving non-seamen decedents would often yield damages exceeding those in cases involving seamen decedents, the court of appeals' approach would be inconsistent with the historic admiralty policy of according "a special solicitude" for the welfare of those who "undert[ake] to venture upon hazardous and unpredictable sea voyages." *Moragne*, 398 U.S. at 387.[12]

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[12] The court of appeals also interpreted selected statements in *Gaudet*, *Miles*, and *Moragne* as endorsing the aplicability of state causes of action. *Gaudet*'s survey of the remedies available in state wrongfuldeath actions, however, does not connote "approv[al] of the application of state statutes in maritime death cases" (Pet. App. A21, citing 414 U.S. at 587-588), but rather, reflects an attempt (like that undertaken in *Moragne*) to use state law as a whole as one guide in shaping the federal maritime remedy. See also *Miles*, 498 U.S. at 27 (cited at Pet. App. A25). And *Moragne*'s observation that Congress had not affirmatively shown an intent to preclude a federal maritime death remedy does not suggest that affirmative legislative action is needed if state law is no longer to be used where the new federal maritime remedy applies (Pet. App. A20, citing 398 U.S. at 393); rather, it merely indicates that Congress had left the Court free to fashion a general maritime remedy.

II. THE COURT OF APPEALS HAD JURISDICTION UNDER 28 U.S.C. 1292(b) TO ADDRESS THE ISSUE OF WHETHER STATE REMEDIAL STATUTES MAY APPLY TO RESPONDENTS' LAWSUIT, BECAUSE THAT QUESTION WAS RELEVANT TO THE VALIDITY OF THE ORDER CERTIFIED BY THE DISTRICT COURT

A. The Court has requested briefing on whether, under 28 U.S.C. 1292(b), a court of appeals can "exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the District Court." 115 S. Ct. 1998 (1995). In the view of the United States, a court of appeals may do so.

Section 1292(b) provides, in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that *such order* involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal *from the order* may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals * * * may thereupon, in its discretion, permit an appeal to be taken *from such order*, if application is made to it within ten days after the entry of the order.

28 U.S.C. 1292(b) (emphasis added). The text of Section 1292(b) thus makes apparent that appellate jurisdiction applies to the *order* that the district court has certified to the court of appeals, and not merely to any question of

law that the district court may have identified in that order. While a district court may be well-advised to identify the question of law involved in its order that it perceives to be controlling, nothing in Section 1292(b) either requires it to do so, or conditions appellate jurisdiction on the district court's having done so.

The decision in *United States* v. *Stanley*, 483 U.S. 669 (1987), reinforces the conclusion that it is the district court's order—and not the question of law the court may formulate—that defines and delimits the court of appeals' jurisdiction. In *Stanley*, the Court held that a court of appeals lacks jurisdiction under Section 1292(b) to reach *beyond* the certified order to address other orders that had been entered in the case. The Court reasoned:

> An appeal under this statute is from the *certified order*, not from any other orders that may have been entered in the case. Even if the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court (*because the statute brings the "order," not the question, before the court*), that jurisdiction *is* confined to the particular order appealed from.

Id. at 677 (emphasis added to clause in parentheses); see also *Swint* v. *Chambers County Comm'n*, 115 S. Ct. 1203, 1211 (1995) (*Stanley* held that appellate review under Section 1292(b) was limited to the "certified order," and barred review of "other, non-certified orders"); *Edwardsville Nat'l Bank & Trust Co.* v. *Marion Lab., Inc.*, 808 F.2d 648, 650 (7th Cir. 1987) (Section 1292(b) "is not a method of certifying questions. The question is the *reason* for the interlocutory appeal, but the thing under review is the order"). Consistent with the Court's discussion in *Stanley*, the courts of

appeals[13] and commentators[14] have held uniformly that appellate jurisdiction extends under Section 1292(b) to

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[13] See, *e.g.*, *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1002 n.2 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987); *Armstrong* v. *Bush*, 924 F.2d 282, 296 n.13 (D.C. Cir. 1991); *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 994-995 (2d Cir.) (Friendly, J.), cert. denied, 423 U.S. 1018 (1975); *Slade* v. *Shearson, Hammill & Co.*, 517 F.2d 398, 400 (2d Cir. 1974); *United States* v. *Banco Cafetero Panama*, 797 F.2d 1154, 1156-1157 (2d Cir. 1986); *Morse/Diesel, Inc.* v. *Trinity Indus., Inc.*, 859 F.2d 242, 249 (2d Cir. 1988); *In re Joint E. & S. Dist. of N.Y. Asbestos Litig.*, 897 F.2d 626, 635 (2d Cir. 1990); *Nedd* v. *United Mine Workers*, 400 F.2d 103, 104 (3d Cir. 1968); *Johnson* v. *Alldredge*, 488 F.2d 820, 822-823 (3d Cir. 1973), cert. denied, 419 U.S. 882 (1974); *Murphy* v. *Heppenstall Co.*, 635 F.2d 233, 235 n.1 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1981); *Merican, Inc.* v. *Caterpillar Tractor Co.*, 713 F.2d 958, 962 n.7 (3d Cir. 1983), cert. denied, 465 U.S. 1024 (1984); *Cipollone* v. *Liggett Group, Inc.*, 789 F.2d 181, 187-188 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987); *In re School Asbestos Litig.*, 789 F.2d 996, 1002 (3d Cir.), cert. denied, 479 U.S. 852, 915 (1986); *Miller* v. *Bolger*, 802 F.2d 660, 666-667 (3d Cir. 1986); *Ivy Club* v. *Edwards*, 943 F.2d 270, 275 (3d Cir. 1991), cert. denied, 503 U.S. 914 (1992); *Dailey* v. *National Hockey League*, 987 F.2d 172, 175 (3d Cir.), cert. denied, 114 S. Ct. 67 (1993); *Ducre* v. *Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 983n.16 (5th Cir. 1985); *Easley* v. *Pettibone Michigan Corp.*, 990 F.2d 905, 912 (6th Cir. 1993); *Nuclear Eng'g Co.* v. *Scott*, 660 F.2d 241, 246 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982); *Edwardsville Nat'l Bank & Trust Co.* v. *Marion Labs., Inc.*, 808 F.2d 648, 650-651 (7th Cir. 1987); *Peterson* v. *Sealed Air Corp.*, 902 F.2d 1232, 1233 (7th Cir. 1990); *Harley-Davidson, Inc.* v. *Minstar, Inc.*, 41 F.3d 341, 344 (7th Cir. 1994), cert. denied, 115 S. Ct. 1401 (1995); *Simon* v. *G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir.), cert. denied, 484 U.S. 917 (1987); *In re Cinematronics, Inc.*, 916 F.2d 1444, 1448-1449 (9th Cir. 1990); *Steering Comm.* v. *United States*, 6 F.3d 572, 576 (9th Cir. 1993); *United States* v. *Fleet Factors Corp.*, 901 F.2d 1550, 1554 n.2 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991); *Aldridge* v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 40 F.3d 1202, 1207 (11th Cir. 1994); *United States* v. *Connolly*, 716 F.2d 882, 884-885 (Fed. Cir. 1983), cert. denied, 465 U.S. 1065 (1984).

the order certified by the district court, and not just to the question of law identified in that order.

Permitting the court of appeals to consider the validity of the certified order furthers Section 1292(b)'s paramount goal of "providing an opportunity to review orders before they result in fruitless litigation and wasted expense." Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 609 (1975). Where an order suffers from a legal infirmity unnoticed by the district court, a court of appeals should not be disabled from identifying or correcting that defect, and thereby from preventing fruitless litigation from ensuing in the district court. It is true, that the requirement of a final judgment often has that effect. But with Section 1292(b), Congress fashioned a considered exception to the final-judgment rule, so as to "materially advance the ultimate termination of the litigation," 28 U.S.C. 1292(b), and promote "expedition of cases pending before the district courts." S. Rep. No. 2434, 85th Cong., 2d Sess. 2 (1958).[15]

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[14] See, *e.g.*, 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3929, at 144-145 (1977) ("the court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question") (footnotes omitted); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.25[1], at 300 (2d ed. 1994) ("it is the *order* that is appealable, and not the controlling question identified by the district court"); Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 628-629 (1975).

[15] The fact that the court of appeals retains discretion under Section 1292(b) not to address a question in a certified order allows it to avoid rendering an advisory opinion where the question of law identified by the district court is, in the court of appeals' view, irrelevant to the validity of the order. See *Edwardsville Nat'l Bank*, 808 F.2d at 651 ("If

B. This case supplies an excellent illustration of the wisdom of Congress's decision in Section 1292(b) not to limit appellate review of an order to the particular question of law identified by the district court. The district court, having determined that respondents' state-law claims were inapplicable, issued an order dismissing those damage claims that it viewed as not viable under federal law. Pursuant to Section 1292(b), the district court then asked the court of appeals for its view on whether three types of damages were in fact recoverable under federal law. Had the court of appeals agreed that federal law governed respondents' remedies, it undoubtedly would have answered those questions.

In light of the court of appeals' view that state-law remedies *were* applicable, however, little purpose would have been served by its answering questions relating to the availability of damages under federal law, since the respondents sought recovery under more generous state-law remedial principles. And for the court of appeals simply to have declined review and allowed the district court to proceed with discovery and trial based on the (mistaken, in the court of appeals' view, belief) that respondent's state claims were inapplicable would have resulted in a substantial waste of time and resources and (assuming that respondents appealed) in a subsequent remand for a new trial to allow the dismissed state claims to go forward. See *Ducre* v. *Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 983 n.16 (5th Cir. 1985) (review under Section 1292(b) appropriate where issue not identified by district court may "provide grounds for reversal of the entire order"). By addressing the merits

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nothing turns on the answer to the question, it ought not to be answered.").

of the district court's order, the court of appeals acted to avoid those predictable inefficiencies.[16]

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[16] The order dismissing various damages claims as inconsistent with federal law (Pet. App. A52) was the second order issued in response to Yamaha's motion for summary judgment. Earlier, the district court had issued an order (*id.* at A51) that declared that respondents' right to recovery would be determined under federal admiralty law and requested briefing on the damage consequences of that ruling. The fact that the district court bifurcated its disposition of Yamaha's motion into separate orders did not, however, render appellate review of the applicability of state remedies improper under *Stanley*. Rather, the order granting summary judgment to Yamaha on some of respondents' damages claims was necessarily based on the finding that state remedies were inapplicable, as the district court explained when it certified that order. See *id.* at A74 (initial certifying order) ("The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action"); *id.* at A78 (amended order) (same); see also Pet. App. A6 ("[T]he answer to the certified question depends in large part on the resolution of the displacement question. We presume that the district court intended this important question of displacement to be considered"); cf. *Swint*, 115 S. Ct. at 1212 (noting possibility that a ruling "inextricably intertwined" with an appealable ruling may itself be appealable).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for the court of appeals to consider further the order certified by the district court.

Respectfully submitted.

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